Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbents Local Exchange Carriers	)))	CC Docket No. 01-338

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby files reply comments in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking in the above-captioned proceeding.[1] Specifically, Nextel files in support of the comments made by T-Mobile in this proceeding concerning the need to perform a Section 251(c) "impairment" analysis on the network elements incumbent local exchange carriers ("ILECs") provide to commercial mobile radio service ("CMRS") providers as well as to the arguments made by Sprint Corporation in its comments in support of availability to CMRS carriers of unbundled network element transport options.

Nextel's Interest in This Proceeding

Like T-Mobile, Nextel is a nationwide CMRS carrier not affiliated with any ILEC. As a competitive carrier, Nextel has been consistent in its positions that the Commission should do

[1]Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Order and Notice of Proposed Rulemaking*, 19 FCC Rcd 16783 (2004) ("*Notice*").

everything within its power to promote the development of facilities-based competition and rational interconnection policies that do not preclude the possibility of intermodal competition.[2]

Like T-Mobile and other CMRS carriers, a fundamental building block of Nextel's CMRS network is the transport connection that Nextel purchases from ILECs to connect Nextel's well over 17,500 cell sites to Nextel's Mobile Switching Centers ("MSCs"). Without these essential ILEC transport connections, no wireless calls can be made or completed. T-Mobile's comments illustrate the dependence CMRS carriers have on ILECs to provide these cell site-to-MSC connections.[3] For Nextel, there is simply no realistic possibility for self-provisioning or alternative supply for ILEC transport, particularly at the last mile, the portion of the connection T-Mobile refers to in its comments as the base station-to-central office link.

Under the current framework ILECs are not obligated to provide wireless carriers with access to UNEs, leaving carriers like Nextel highly dependent upon tariffed special access and similar offerings. And ILEC interstate special access rates, as the Commission knows, are subject to pricing flexibility.[4] This ILEC pricing flexibility has resulted in rapidly increasing

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[2] *See, e.g.*, Comments of Nextel Communications, Inc., CC Docket No. 01-338, CC Docket No. 96-98, CC Docket No. 98-147 (Apr. 5, 2002); Reply Comments of Nextel Communications, Inc., CC Docket No. 01-338, CC Docket No. 96-98, CC Docket No. 98-147 (July 17, 2002); Comments of Nextel Communications, Inc., CC Docket No. 01-92 (Aug. 21, 2001); Reply Comments of Nextel Communications, Inc., CC Docket No. 01-92 (Nov. 5, 2001).

[3] Comments of T-Mobile USA, Inc., WC Docket No. 04-313, CC Docket No. 01-338, at 11-12 (Oct. 4, 2004) ("T-Mobile Comments").

[4] Access Charge Reform, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221 (rel. Aug. 27, 1999).

rates for ILEC transport for wireless carriers, other carriers and large telecommunications users.[5] As Sprint notes in its comments, tariffed ILEC special access service is roughly double the cost of UNE dedicated transport and the "single largest network operating cost of Sprint's mobile wireless division is the purchase of dedicated transport facilities."[6] As a wireless carrier with similar network operating costs driven by ILEC special access rates that would like the opportunity to substitute local landline phone service with wireless, Nextel has an interest in the Commission performing a reasoned impairment analysis of those ILEC network elements Nextel and other CMRS carriers must have in order to succeed in that business.

The Commission Has the Authority and Latitude Under the USTA II Decision to Perform a New Impairment Analysis on Each of the Elements T-Mobile Identifies.

As demonstrated in T-Mobile's comments, the *USTA II* court did not foreclose the Commission from analyzing whether would-be entrants would be impaired without access to ILEC network elements under Section 251(c).[7] Rather, as the court observed in addressing the arguments presented to it, the Commission was to "consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired."[8] The court also noted that in this endeavor the Commission would be free to take into account such factors as administrability, risk of ILEC abuse, and similar factors.

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[5] *See, e.g.,* AT&T Corp., Petition for Rulemaking, RM-10593, at 11-12 (filed Oct. 15, 2002) ("AT&T Petition"). *Petition for Writ of Mandamus pending, In re AT&T Corp., et al.,* D.C. Circuit, Docket No. 03-1397 (Nov. 5, 2003).

[6] Comments of Sprint Corporation, WC Docket No. 04-313, CC Docket No. 01-338, at 55 (Oct. 4, 2004) ("Sprint Comments").

[7] *United States Telecom Ass'n. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"). *See* T-Mobile Comments at 6.

[8] *USTA II* at 577.

The Commission plainly is not foreclosed by the court from undertaking a new impairment analysis; rather, it was instructed not to "arbitrarily exclude[e] alternatives offered by the ILECs."[9] As a result, while the Commission's impairment analysis must evaluate the availability of ILEC special access as an alternative to UNEs, the availability of special access does not end the analysis. Rather, the Commission can and should consider whether ILEC special access pricing and service quality impair the ability of wireless carriers to provide a true intermodal alternative to landline local telephone service.

Wireless Services Are Not Yet Broadly Replacing Landline Local Telephone Service.

ILEC comments attempt to forestall any CMRS impairment analysis by asserting that wireless carriers and ILECs compete in the same market due to increasing substitutability of wireless for landline local telephone service. By claiming there is a coalescing local services market of broadband packet service providers and wireless carriers, the ILECs unreasonably expand the relevant market. In addition to their individual comments, the ILECs jointly filed a report in this proceeding which purports to characterize the state of local telephone service competition as robust. The report is a glowing review of the cable, broadband VoIP and wireless service competition that the ILECs claim is an overwhelming threat to their dominance. The report asserts that wireless phones are ubiquitous, that "far more consumers are now using their wireless phone as their primary phone" and "the overwhelming majority of consumers now view wireless quality as perfectly adequate for voice."[10] While the foregoing assertions may be true

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[9] Id.

[10] *See UNE Fact Report 2004*, filed by BellSouth Corporation, SBC Communications, Inc., Qwest Communications International, Inc. and the Verizon telephone companies, WC Docket No. 04-313, CC Docket No. 01-338, at II-27 and II-28 (filed Oct. 4, 2004).

in some anecdotal cases, the hard evidence is to the contrary. The Phoenix Center for Advanced Legal, Economic and Public Policy Studies, an independent 501(c)(3) think tank, recently published a paper titled "Fixed-Mobile 'Intermodal' Competition in Telecommunications: Fact or Fiction."[11] The study concluded, using a "straightforward antitrust market definition analysis," that "*even though there may be exceptions, consumers generally do not consider the two services as sufficiently good substitutes such that a small but significant and nontransitory price increase for wireline service is unprofitable.*"[12]

Even if one were to accept the general accuracy of the ILEC assertions, they do not support the further assertion that large numbers of landline local telephone subscribers are actually cutting the cord and leaving the landline network entirely. To the contrary, as the Commission just last month observed in its *Ninth Annual CMRS Competition Report*:

> it appears that only a small percent of wireless customers use their wireless phones as their only phone, and that relatively few wireless customers have 'cut the cord' in the sense of canceling their subscription to wireline telephone service.[13]

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[11] Phoenix Center Policy Bulletin No. 10 (March 31, 2004), *available at* http://www.phoenix-center.org/PolicyBulletin/PCPB10Final.doc. *See also*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, *as modified by errata*, 18 FCC 19020, ¶¶ 230, 245 (2003) (wireless service is primarily a complement, and not yet a complete substitute for, wireline service).

[12] Id. at 2 (emphasis in original).

[13] Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Ninth Report*, 2004 FCC LEXIS 5535, FCC 04-216, ¶ 212 (rel. Sep. 9, 2004) ("*Ninth Report*"). Only 14 percent of consumers use their wireless phone as their primary phone, but a much smaller number have replaced their local landline telephone service with wireless service. *See* C. Wheelock, In-Stat/MDR, *Cutting the Cord: Consumer Profiles and Carrier Strategies for Wireless Substitution* at 1 (Feb. 2004).

While the customer penetration rate for wireless service has increased to 54 percent of the population, the landline local telephone service penetration rate is over 94 percent.[14] The growth of wireless service proves nothing about the substitutability of wireless services for primary line landline phone service.[15] Further, continuing differences between mobile wireless services and landline services with respect to service quality, price and functionality, among others, preclude consumers from viewing wireless as a close substitute for primary line phone service.[16]

The Commission Has to Consider the Relevant Market to Determine Impairment.

As both the Sprint and T-Mobile comments observe, the relevant market for any Section 251(c) impairment analysis for a telecommunications carrier entering a market has to be the market that the carrier seeks to enter.[17] In the case of wireless carriers, there is little question of the scope and intensity of intramodal competition, as the Commission recognized in its Ninth Annual CMRS Competition Report.[18] But that fact is not relevant to the Commission's necessary inquiry. Where a wireless carrier seeks to displace landline local telephone service

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[14] *See Trends in Telephone Service*, Industry Analysis and Technology Division, Wireline Competition Bureau, 16-3 (rel. May 6, 2004). In 2003, the national mobile wireless sector increased subscribership from 141.8 million to 160.6 million. *Ninth Report* at ¶ 5.

[15] There are currently six nationwide wireless carriers, AT&T Wireless, Sprint PCS, Verizon Wireless, T-Mobile, Cingular Wireless and Nextel. Assuming that the Cingular/AT&T Wireless merger is approved, the two largest of the remaining five providers will be owned or controlled by three BOCs.

[16] *See* T-Mobile Comments at 19.

[17] *See* T-Mobile Comments at 17; Sprint Comments at 33-35.

[18] *See Ninth Report* at ¶ 3 ("With respect to carrier conduct, the record indicates that competitive pressures continue to compel carriers to introduce innovative pricing plans and service offerings, and to match the pricing and service innovations introduced by rival carriers. Price rivalry is evidenced by the continued expansion of pricing innovations such as free night and weekend minutes and free mobile-to-mobile calling among an individual carrier's customers.")

completely, the analysis of impairment must focus on an entrant's ability to replace landline local telephone service absent access to ILEC UNEs and whether entry into that market is uneconomic without access to UNEs.[19] The current market reality is that wireless carriers, including Nextel, are precluded from competing with ILECs in the primary line market, in part, because the only transport services that ILECs will readily sell to wireless carriers are retail services like special access, a service for which ILECs earn supra-competitive returns at the interstate level. The Commission has never undertaken an analysis that examines the effect of these inflated network costs on the ability of wireless carriers to provide lower priced services that could more readily compete with landline local telephone service.

The Availability of ILEC Special Access Is Not a Realistic Alternative.

ILEC comments largely ignore the glaring competitive problems that spring from using ILEC tariffed special access to connect wireless cell sites and switches, apparently because the ILECs have no ready answer to the question of why wireless carriers seeking to replace landline local telephone service should face supra-competitive prices for the DS1 circuits (often of questionable quality) that they purchase from ILECs. USTA's comments, for example, entirely ignore the wireless last mile problem, and concentrate instead on the availability of tariffed special access for CLEC high capacity transport. USTA's entire discussion focuses on CLEC

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[19] The *USTA II* court faulted the Commission's initially broad interpretation of the statutory term "impairment," observing in the *USTA I* case that the Commission "is obligated to establish unbundling criteria that are at least aimed at tracking relevant market characteristics and capturing significant variation." In light of this direction, the Commission revised its definition in the TRO Order to state that a carrier would "be impaired when lack of access to an incumbent LEC network element poses a *barrier or barriers to entry*, including operational and economic barriers that are *likely to make entry into a market uneconomic.*" *USTA II* at 563. While the *USTA II* court criticized the Commission's revised definition of impairment as vague, it refused to review it in light of the court's decision to remand the case to the Commission for additional consideration. *Id.* at 572.

special access use for high capacity routes. USTA urges the Commission to analyze transport impairment on an MSA-wide basis. USTA observes that "it appears unlikely that any locations exist where CLECs are impaired without access to high cap loops and transport."[20]

This is not an impairment analysis that the Commission can accept as to wireless. As T-Mobile's comments demonstrate, the types of wireless carrier uses for ILEC loop and transport generally are not high capacity and, as a consequence of the need to locate cell sites to provide adequate geographic radio coverage, the transport required is quite often on "thin" routes, covering large geographic areas where no other provider has the ubiquitous reach of the ILECs. The USTA and other ILEC comments arguing that special access is an alternative to UNEs for loop and transport thus miss a critical point.

The unfortunate results of the Commission's pricing flexibility policies on ILEC interstate special access rates demonstrate that special access is a poor alternative for wireless carriers to rely on to challenge the ILECs for landline local telephone service customers. It is well documented that in the five years since the Commission provided ILECs with pricing flexibility on special access, ILEC pricing of these services has increased substantially.[21] As documented by AT&T in its October 2002 petition for rulemaking on ILEC special access rates and in more recent studies, ILEC special access pricing flexibility policy has resulted in supra-

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[20] Comments of United States Telecom Association, WC Docket No. 04-313, CC Docket No. 01-338, at 21 (Oct. 4, 2004) ("USTA Comments").

[21] *See* Economics and Technology, Inc. "Competition in Access Markets: Reality or Illusion" at 35, attached to Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users Committee, WC Docket No. 04-313 (filed September 30, 2004) ("ETI Access Study").

competitive rates and rates of return consistently well in excess of 11.25 percent.[22] And these supra-competitive rates of return are trending higher and higher each year.[23]

However well intentioned the Commission's policy when originally adopted, it is now obvious that ILECs can price special access at supra-competitive rates in many markets and on routes where wireless carriers have no other supplier.[24] Where a wireless carrier such as T-Mobile seeks to compete directly with an ILEC, that excessively priced necessary input to T-Mobile's network operating cost can act as a barrier to that competition. According to T-Mobile's estimates, ILEC special access rates are 79% higher than UNE transport rates.[25]

Thus, ILEC special access is a poor alternative to UNEs for wireless carriers seeking to compete for landline local telephone service customers, particularly when the latter often enjoy truly unlimited, flat rate local calling at very low rates compared with wireless service packages.[26] Absent some change in this regulatory framework, wireless carriers cannot take the steps necessary to improve service quality or to lower prices sufficiently to become intermodal competitors in any meaningful way. Indeed, regardless of what the Commission does with its

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[22] AT&T Special Access Pricing Petition, Declaration of Stephen Friedlander at 7.

[23] *See* ETI Access Study at 35.

[24] The Phoenix Center also published a recent Policy Paper titled "Set It and Forget it: Market Consequences of Premature Deregulation in Telecommunications Markets." There, the authors concluded that "the Commission's deregulatory scheme for Special Access had produced *substantial* and *sustained* price increases for Special Access services where pricing flexibility is granted." (emphasis in original). *See* Phoenix Center Policy Paper No. 18, 2 (July, 2003), *available at* http://www.phoenix-center.org/pcpp/PCPP18.doc.

[25] T-Mobile Comments at 21.

[26] It is also critical that the Commission make any UNE choices made available to wireless carriers real choices. If ILECs can preclude carriers from combining UNEs with tariffed services as well as commingling, then the Commission will fail to advance the opportunity for intermodal competition.

UNE impairment analysis for wireless carriers, the matter of continuing ILEC special access pricing flexibility and questionable service quality is a serious one that deserves the Commission's prompt attention.

Conclusion

The Commission's charge on remand is to take the *USTA II* court's instruction to apply the UNE impairment analysis in a manner that does not disregard the availability of ILEC tariffed special access as a service alternative. The need to understand the network configurations typical of mobile wireless carriers is critical to this analysis, as is the understanding that while the wireless industry is intensely competitive, wireless carriers have yet to seriously threaten landline local telephone service. Where wireless carriers have no choice but to rely upon ILEC facilities to link their cell sites, the obvious and documented opportunity ILECs have to earn supra-competitive rates from their would-be competitors should be considered in the Commission's analysis and actions.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

/s/______________________________

Leonard J. Kennedy
Senior Vice President and General Counsel
Kent Nakamura
Vice President, Deputy General Counsel-Regulatory
2001 Edmund Halley Drive
Reston, Virginia 20191
703-433-4000

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Its Attorneys